

## REVIEW ESSAY

### The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning

PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES. By Andrew von Hirsch and Andrew Ashworth. Oxford: Oxford University Press, 2005. Pp. xii, 238. \$99.00 (cloth).

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## INTRODUCTION

Andrew von Hirsch and Andrew Ashworth's new book, *Proportionate Sentencing: Exploring the Principles*, is the latest chapter in a debate that has gone on now for over thirty years between their "just deserts" account of sentencing and its main rival, "limiting retributivism," first set out by Norval Morris and subsequently endorsed and developed by a number of other prominent sentencing writers in the United States such as Michael Tonry, Richard Frase, and Kevin Reitz. This debate has heated up recently with the publication of the American Law Institute's draft *Model Penal Code: Sentencing* provisions, which explicitly endorse limiting retributivism rather than von Hirsch and Ashworth's just deserts account.<sup>1</sup> We suspect that one

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1. Model Penal Code: Sentencing (Discussion Draft 2003). Kevin Reitz, the ALI's reporter for this project and a major proponent of limiting retributivism, states that the "basic framework for the new vision of sentencing purposes" borrows from "Norval Morris's theory of limiting retributivism that organizes retributive and utilitarian goals and makes them applicable to decision-makers throughout the sentencing system." *Id.* at 4. There is also a more recent version of the statutory text that appeared in 2006: Model Penal Code: Sentencing (Discussion Draft 2006).

of the tacit<sup>2</sup> aims of von Hirsch and Ashworth's new book is to show that the ALI's decision was mistaken.

Although both sides purport to provide an overarching account of the law of sentencing, in fact each of them concentrates its efforts on a particular aspect of the enterprise. Limiting retributivism has always been concerned primarily with criminal justice policy making and institutional design. Morris, Tonry, Frase, and Reitz focus much of their energy on questions such as the composition of a sentencing commission, its procedures for setting overall penalty levels, designing sentencing alternatives to prison and probation and—as a question of institutional design—the regulation of judicial discretion in sentencing. It is not surprising that the American Law Institute's new draft *Model Penal Code: Sentencing* provisions, which are focused squarely on those same questions of overall criminal justice policy and institutional design, should endorse this approach.

Von Hirsch and Ashworth's just deserts account has always had a different focus. Although they do not entirely ignore questions of policy and institutional design, their central concern has always been on the *justification* of state coercion through the mechanisms of sentencing. Although they recognize that a complete account of sentencing will have to accommodate some policy considerations, they insist that justice must be the first virtue of the law of sentencing. For those who are concerned with the special role of the sentencing court as a “forum of principle,”<sup>3</sup> von Hirsch and Ashworth provide the best account available—the most thorough, the most thoughtful, and the most rigorous.

When advocates of these two accounts are faced with real, live sentencing situations, they tend to favor broadly similar outcomes in most cases. Of course, they provide quite different reasons for these outcomes. Whereas just deserts is concerned with the state's ability to justify the use of coercive power over the particular offender, limiting retributivists emphasize the

2. The authors directly criticize the ALI for its decision to endorse limiting retributivism (183). This theme does not arise explicitly, however, until the appendix dealing with limiting retributivism. It appears to be a tacit concern throughout, however.

3. The notion of the court as a forum of principled reasoning where judges are only entitled to appeal to limited set of public reasons is a common theme in the writings of Ronald Dworkin, who used the phrase “forum of principle” as the title of his famous article, and John Rawls, who famously described law courts as the prime exemplars of what he termed “public reason.” See Ronald Dworkin, *The Forum of Principle* 56 *NYU L. Rev.* 469 (1981); John Rawls, *Political Liberalism* 231 (1993).

policy rationales for doing so. The most striking example of this phenomenon is the endorsement of the Minnesota guidelines system by the major advocates of both accounts. Limiting retributivists concern themselves with the institutional design features of the Minnesota system: its limits on aggregate incarceration rates, its presumptions in favor of rehabilitation measures over incarceration for many types of offenses, and its recognition of the role of instrumental goals in the choice among non-disproportionate sentences. Just deserts advocates point to the way in which the Minnesota system structures a sentencing judge's reasoning: the central role it gives to proportionality, its concern for parity across offenders, and its restrictions on the sorts of reasons that might justify deviations from the grid.

Should anyone care any more about this long-standing theoretical dispute among sentencing theorists? The answer to this question, we believe, is a resounding "yes." Although it might not give rise to radically different results in practice, both accounts teach us some extremely valuable lessons that are too often forgotten.

This essay proceeds in four parts. In part 1, we review the basic theoretical foundations of von Hirsch and Ashworth's just deserts account and the ALI's favored limiting retributivism. In this section, we emphasize the important conceptual differences that separate the two accounts. In part 2, we examine recent efforts by the two sides to put their accounts into practice. We focus on von Hirsch and Ashworth's new book, *Proportionate Sentencing*, and the ALI's new draft *Model Penal Code: Sentencing* provisions. Here, we note that there are far more practical commonalities between the two accounts than differences. Finally, in part 3, we examine some of the lessons that the two accounts have taught us about some of the pressing sentencing issues of our time: the centrality of the judicial role in sentencing, the difficulties involved in institutional design, and the need to respond to the challenge of restorative justice.

## I. THEORETICAL DIVISIONS

Limiting retributivism and just deserts both arose in the mid-1970s in response to the perceived failure of indeterminate sentencing in the United States<sup>4</sup> coupled with a growing recognition that sentencing had

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4. This model never came to dominance outside the United States. Nevertheless, it had some influence. For example, for a number of decades, two Canadian provinces (Ontario

become an unprincipled exercise of state power. In the course of a few short years, many of the prevailing orthodoxies of sentencing were turned on their head. In 1971, the American Friends Service Committee published *Struggle for Justice*,<sup>5</sup> arguing that indeterminate sentencing violated the rights and interests of prisoners; in 1972, Judge Marvin Frankel published *Criminal Sentences: Law without Order*,<sup>6</sup> pointing out just how arbitrary the practice of sentencing had become; and in 1974, Robert Martinson published his famous and inordinately influential article “What Works? Questions and Answers about Prison Reform,”<sup>7</sup> in which he argued that the rehabilitative programs that were the backbone of the system of indeterminate sentencing were much less effective than had previously been assumed. In response to these challenges, Andrew von Hirsch and Norval Morris both adopted the notion of proportionate sentencing as a way of limiting sentencing discretion, curbing the state’s coercive power over offenders and restoring the legitimacy of sentencing. But, as the debates of the ensuing three decades have shown, they proceeded with this notion in crucially different ways.

### A. The Theoretical Foundations of Just Deserts

The original von Hirsch just deserts account was a radical reaction to the failures of indeterminate sentencing in the 1970s. Although the indeterminate sentencing model often subjected offenders to long sentences that

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from 1913 and British Columbia from 1948) allowed judges to add an “indefinite sentence” of “two years less a day” on top of a “definite sentence” of no more than two years less a day. This was abolished in 1977. See Criminal Law Amendment Act 1977, S.C. 1976–77, ch. 53, § 46(3)–(9) (repealing § 44 (Ontario) and § 50 (British Columbia) of the Prisons and Reformatories Act, R.S.C. 1970, c. P-21).

5. American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (1971).

6. Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1972).

7. Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 *Pub. Int.* 22 (1974). The full report was less absolute, finding some value in parole supervision. See Douglas Lipton, Robert Martinson, & Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975). See also Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 *Hofstra L. Rev.* 243 (1979), which is sometimes referred to as a clarification and sometimes a recantation.

failed to rehabilitate most of them, von Hirsch's principal objection to it was that neither it nor the rehabilitative ideal upon which it was based could provide *reasons* that would justify the state's imposition of such coercive measures. It is not enough, he argued, to tell an offender that he will face indefinite detention simply because we believe that this is most likely to bring about his rehabilitation (much less because we think that this will deter others). Now, in *Proportionate Sentencing*, von Hirsch and Ashworth offer their most complete statement of sentencing principles that they believe will enable judges to provide adequate justifications for the imposition of sentence.<sup>8</sup>

It is useful to distinguish between three stages in von Hirsch and Ashworth's overall argument. At the first stage, they argue from an account of the nature of punishment and the legitimate use of coercive force by the state to the centrality of desert in the distribution of criminal punishments. At the second stage, they set out the basic theoretical tools that make it possible to determine specific, deserved sentences in particular cases. Finally, at the third stage, they return to the messy world of sentencing practice and consider how their just deserts account of sentencing would deal with the many pressing problems and competing demands facing the criminal justice system today. Over the years, von Hirsch and Ashworth have addressed all three stages of the argument. Nevertheless, until now, their attention has been focused largely on the first two, more theoretical stages. With the publication of *Proportionate Sentencing*, they focus most of their attention on the third, more practical stage, especially by addressing some criticisms directed at their model over the years.

Von Hirsch and Ashworth begin their account with an exploration of the nature of state punishment. The reason why questions of justice play such an important part in the distribution of punishment, they argue, lies in the special nature of state punishment itself. Punishments are different from, say, taxes or quarantines because of their special

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8. Like Hart before them, however, they do not investigate the liberal individualist foundations of their theory of punishment in any detail. See H.L.A. Hart, Prolegomenon to the Principles of Punishment, in *Punishment and Responsibility: Essays in the Philosophy of Law* 5 (1968).

communicative function. When we are required to pay money in taxes or forced into quarantine for medical reasons, these hardships do not usually imply any moral judgment of us. For the most part, we should be willing to accept at least some of these burdens as the price of membership in the larger community.<sup>9</sup> Criminal punishment, by contrast, is first and foremost a mechanism for the state to communicate the community's censure of us for our violation of the criminal law. In order to provide an added incentive to obey, the censure of criminal punishment is communicated by means of hard treatment. Accordingly, the severity of the hard treatment imposed on us communicates the degree of censure the state means to convey. As such, punishment is radically different from non-censuring state-imposed burdens such as taxes and quarantines. Justice requires that forms of censure such as criminal punishment should be imposed only on those who have actually done wrong and only in proportion to their wrong.<sup>10</sup>

Much of the criticism of just deserts flows, in our view, from a confusion about the notion of justice that von Hirsch and Ashworth invoke at this point. When they talk of sentencing offenders to the punishment they *deserve*, it is tempting to assume that they believe in some absolute scale linking particular offenses to particular punishments. But that is not so. Von Hirsch and Ashworth have long recognized that there "seems to be no crime for which one can readily perceive a specific quantum of punishment as the uniquely deserved one" (142). Their claim about the importance of giving offenders their just deserts has its roots in H.L.A. Hart's famous distinction between the general justifying aim of a system of punishment and the principles of distribution that operate within such a system.<sup>11</sup> Once the state has undertaken to institute a system of punishment, they argue, the distribution of punishment is subject to the demands of *distributive* justice, and the appropriate criterion for distribution is individual desert.

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9. As the vast literature in liberal political theory makes clear, of course, questions of justice also play a part in the allocation of taxes and other burdens. The point here is simply that the role of individual desert is strongest in the allocation of punishment.

10. This is not a merely a "definitional stop" argument of the sort H.L.A. Hart famously rejected. See Hart, *supra* note 8, at 5. Rather, it is an argument of substantive justice about the appropriate criteria for the distribution of censure.

11. *Id.* at 4.

Distributive justice is a relative notion: one can never determine whether one has received one's fair share except by comparison with that which has been allocated to others. Accordingly, von Hirsch and Ashworth insist that rough-and-ready judgments about what sentence fits what offense (which they call "cardinal proportionality") can only provide what they call "anchoring points" to a system of proportionate sentencing. Convention will determine the "anchoring points" and from there, the day-to-day work of sentencing judges will be guided by our much more precise judgments about the relative deserts of particular offenders (which they call "ordinal proportionality"). Over time, as more and more offenders are sentenced, we will have more and more cases to help us to determine precisely how severe a sentence is deserved in each case.

A central problem in providing a structured scale of crimes and punishments is the need to find a common measure of the apparently incommensurable harms inflicted by crimes as diverse as rape and murder, theft and fraud, insider trading and environmental pollution. Without such a common yardstick, the project of ensuring their brand of relative proportionality, where more serious offenses receive more severe sentences and less serious ones receive less severe sentences, would be an unachievable ideal. In response, von Hirsch and Ashworth have examined in some detail the two principal factors that determine crime seriousness: the harm threatened or caused by the offense and the offender's individual culpability in committing the offense. In a groundbreaking article coauthored with Nils Jareborg, Andrew von Hirsch set out an account of harm that could serve as a meaningful yardstick for comparing offenses (and, where necessary, for comparing punishments, as well), based on the effect of conduct on what they call the victim's "living standard."<sup>12</sup> That is, they argued that offenses can be grouped into basic categories depending on the extent to which they harm the following dimensions of human welfare: physical integrity, material support, privacy, and freedom from humiliation. Although this account is far from perfect, it makes clear that it is possible

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12. Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 *Oxford J. Legal Stud.* 1 (1991). Although von Hirsch and Jareborg limit themselves to the consideration of crime seriousness in their article, von Hirsch and Ashworth make clear in their new book (147) that the same "living standard" account can also be used to set punishments on a single scale of severity, as well. For the antecedents of this "living standard" account, see Amartya Sen et al., *The Standard of Living* (1987).

in principle to set offenses on a single, quite plausible scale of seriousness for the purpose of determining the appropriate, deserved sentence.

Establishing that it is even possible to determine sentence severity purely according to crime seriousness has proven to be a very difficult business. As a result, this task, which is really only a first step in the elaboration of a complete just deserts account of sentencing, has attracted much of von Hirsch and Ashworth's attention until quite recently. It is also at this stage that they have attracted the most criticism. The challenge that is most often raised by limiting retributivists and by many others is that proportionality can never be as precise a guide in sentencing as von Hirsch and Ashworth would have us believe. As Tony Bottoms put it, justice and desert when applied to sentencing are "asymmetrical concepts, in the sense that it is reasonably easy to establish what is unjust or undeserved, but not what, precisely, is just or deserved."<sup>13</sup> When von Hirsch and Ashworth refine our judgments about proportionate sentences by comparing one offender to others who were sentenced for similar offenses, the argument goes, they are no longer dealing with the value of proportionality. Instead, they are referring to the quite different value of parity among offenders—the principle that like offenses should receive like punishments. And it is precisely the principle of parity among offenders that comes under severe scrutiny from limiting retributivists. They insist that this value must give way whenever it is at odds with considerations that they deem more important, such as the minimization of the use of punishment (what Norval Morris calls "penal parsimony") or the effective pursuit of instrumental goals such as deterrence, rehabilitation and the like.<sup>14</sup>

A second criticism that von Hirsch and Ashworth have attracted as a result of their focus on crime seriousness and sentence severity is that just deserts is unacceptably formalistic. By focusing almost exclusively on fitting punishments to particular crimes, von Hirsch and Ashworth have given the impression over the years of being uninterested in virtually any other aspect of the offender's situation. But almost everyone recognizes that other features of the offender's situation—such as his youth, his social deprivation, the effect of punishment on third parties, and so on—may be

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13. Anthony Bottoms, *The Philosophy and Politics of Punishment and Sentencing*, in *The Politics of Sentencing Reform 20* (C.M.V. Clarkson & R. Morgan eds., 1995), citing J.R. Lucas, *On Justice* (1980).

14. Norval Morris, *Madness and the Criminal Law* ch. 5 (1982).



relevant to the determination of sentence. Insofar as von Hirsch and Ashworth appear to discount these factors, their account has suffered. Before we consider the extent to which *Proportionate Sentencing* has addressed these objections, it is worthwhile to review the basic features of their main rival, limiting retributivism.

## B. Limiting Retributivism

All of the most important proponents of limiting retributivism—Norval Morris, Michael Tonry, Richard Frase, and Kevin Reitz—seem to be far more interested in providing solutions to certain disastrous problems with the criminal justice system in the United States than they are with the finer points of judicial reasoning and legitimacy. The pressing problems of sentencing, they argue, are such things as the vast and growing size of the prison population; the great number of prison inmates who are in need of treatment for mental health issues, substance abuse, and other problems who are not receiving adequate treatment; the overrepresentation of racial minorities in prison populations; and the reluctance on the part of many officials to make use of promising noncustodial alternatives. The focus of their efforts has been squarely on these issues. They are most concerned to put in place a set of institutional norms and processes that ensure that fewer individuals will serve custodial sentences, that racial disparities in sentencing will be addressed, that sentences will be generally less punitive, and that those who need treatment will receive it.

As crafters of penal policy, limiting retributivists stand squarely within the tradition of utilitarian (and more broadly consequentialist) thinkers on penal policy stretching all the way back to Jeremy Bentham and Cesare Beccaria.<sup>15</sup> Like Bentham and Beccaria, they espouse two basic utilitarian principles of sentencing. First, they insist that the state should not impose sentences that are out of proportion to the particular offenses to which they are responses. This principle clearly echoes Beccaria's claim that punishments "should be chosen in due proportion to the crime so as to make the most efficacious and lasting impression on the minds of men, and the least painful impression on the body of the criminal."<sup>16</sup> Second, they insist

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15. See Richard Frase, *Limiting Retributivism*, in *The Future of Imprisonment* 94 (Michael Tonry ed., 2004) (pointing to these roots, citing Bentham and Beccaria).

16. Cesare Beccaria, *Of Crimes and Punishments* 49 (Jane Grigson trans., 1996).

that punishment should only ever be imposed where there is a good prospect that it will accomplish some good, and only to that extent. This so-called principle of parsimony harkens back to Bentham's dictum that "all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."<sup>17</sup>

Despite their utilitarian roots, most limiting retributivists have also recognized that the principle of proportionality is at least in part founded on intuitions of justice. As early as 1974, Norval Morris looked at incapacitation and argued that "as a matter of *justice* we should never take power over the convicted criminal on the basis of unreliable predictions of his dangerousness."<sup>18</sup> Rather, the principle of desert should determine outer limits on the amount of punishment that may legitimately be inflicted on an offender. Nevertheless, Morris's notion of proportionality remained starkly different from the one espoused by von Hirsch and Ashworth. Whereas von Hirsch and Ashworth insisted that proportionality could provide a single, determinate punishment in particular cases, Morris assumed that it could only set very loose limits on the court's pursuit of instrumental goals in sentencing. All we can say, Morris argued, is that "punishment in excess of what is felt by the community to be the maximum suffering justly related to the harm the criminal has inflicted"<sup>19</sup> would be unjust. Within the limits of what the community finds acceptable, however, courts should be free to impose whatever penalty best accomplishes the many goals of sentencing.

On a theoretical level, then, limiting retributivism and just deserts are starkly at odds with one another. Whereas von Hirsch and Ashworth's just deserts account insists that punishment ought to be distributed according to individual desert with little concern for the consequences in the individual case, limiting retributivism seems to insist that punishment should be imposed largely on the basis of consequences, with only a very loose outer limit imposed by community notions of what is fitting in the circumstances. As we shall see, however, this most general theoretical disagreement

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17. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in *A Fragment of Government with An Introduction to the Principles of Morals and Legislation* 281 (1948).

18. Norval Morris, *The Future of Imprisonment* 73 (1974).

19. *Id.* at 75.

fades into the background as the two systems tackle the problem of how to design a functioning system of punishment. Faced with the practical realities of sentencing, limiting retributivists have recognized the importance of disciplining judicial discretion, and just deserts advocates have recognized the importance of a wider variety of factors that are relevant to the determination of sentence that go well beyond crime seriousness.

## II. CONVERGENCE ON OUTCOMES

In recent years, limiting retributivists have begun to concede that they must give greater weight to proportionality in sentencing than they had.<sup>20</sup> And now, with the publication of *Proportionate Sentencing*, just deserts is also beginning to move toward common ground. In many ways, von Hirsch and Ashworth's new book does not say anything altogether new: the basic outlines of their theoretical account of sentencing remain largely the same. The real progress it makes lies in its shift of emphasis away from the first two, theoretical stages (concerning the foundations of just deserts in the nature of state punishment and the possibility of determining sentence severity simply on the basis of crime seriousness) and toward the third, more practical stage, concerned with the construction of a desert-based system of criminal justice that also pays due attention to other pressing considerations. When the advocates of these two accounts of sentencing get around to designing a functioning system, the models they propose look surprisingly similar.

### A. The New, "Modified" Just Deserts

In their new book, von Hirsch and Ashworth quickly review the theoretical foundations of their account in order to proceed to the more practical business of constructing an actual, working system of sentencing. What is new is the amount of attention they give to a wide variety of mitigating factors that might play a part in the determination of sentence. Some of these mitigating factors are to be found simply by looking more closely at the notion of proportionate sentencing itself and specifically the elements

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20. Michael Tonry, Proportionality, Parsimony and Interchangeability of Punishments, in *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* 59 (Antony Duff et al. eds., 1994), Frase, supra note 15.

of offense gravity and offender culpability. They note that individual culpability is not captured only by reference to the criminal law's different mens rea standards. There are also a number of other important considerations that play a role such as the offender's motive for committing the crime and the amount of harm he had intended to inflict. They also recognize that fairness requires that culpability should be evaluated on a different scale for different offenders. Those who have a reduced ability to resist impulsive behavior or to anticipate the consequences of their actions (such as many young offenders and perhaps some intellectually disabled offenders) should not be deemed to have the same culpability as those who have such abilities but choose not to exercise them.

Where von Hirsch and Ashworth truly move beyond the scope of their previous work, however, is in recognizing a number of mitigating factors that do not directly concern crime seriousness at all. In previous works,<sup>21</sup> they have recognized that first-time (and second- and perhaps even third-time) offenders should be treated more leniently than those who have been convicted of the same offense many times. The rationale for this discount, they argue, is still just deserts. We ought still to punish individuals in proportion to their moral desert as demonstrated through their conduct. But a tolerant and liberal system of punishment, they argue, should give the benefit of the doubt to first-time offenders, presuming that their offense constitutes a sort of moral lapse—conduct that does not fully reflect their settled character. If the offender persists in this sort of conduct, of course, even a tolerant system of punishment must recognize at some point along the path of criminality that this presumption has been defeated and that the conduct does, in fact, reflect the offender's settled character.

Von Hirsch and Ashworth use this same sort of reasoning to recognize a general ground of mitigation for young offenders. A tolerant and liberal system of punishment should recognize that youth is a time for "testing limits." Indeed, the liberal ideal of the autonomous individual requires that we test our freedom as we mature in order to understand its meaning and its proper limits. Accordingly, it is appropriate to assume that the conduct of young offenders is not truly reflective of their settled character in the same way as the conduct of fully mature adults. Thus, whenever someone who is under the age of majority commits an offense, it is fair to

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21. For his first systematic treatment of the question of prior record, see Andrew von Hirsch, *Desert and Prior Convictions in Sentencing*, 65 *Minn. L. Rev.* 591 (1981).

presume that this is at least in part because he is testing the limits of his freedom (and not simply because of his bad moral character). This means that young offenders should be treated somewhat more leniently than adult offenders who commit the same offenses with the same individual culpability. But, as with first-time offenders, this presumption does not last forever: when the offender reaches the age of majority, he is no longer presumed to be “testing limits” but is simply subject to the same standards as everyone else.

Von Hirsch and Ashworth are not the first to argue in favor of discounts for first-time offenders and young offenders<sup>22</sup> (although it is more common to see criminal record treated as an aggravating factor).<sup>23</sup> What makes their arguments on these and other questions so noteworthy is that whereas many sentencing judges might grant a discount to a first-time offender on the basis of instrumental considerations, they provide *desert-based* reasons for recognizing these sorts of mitigating factors. For example, it is often assumed that recidivists should receive higher penalties than first-time offenders because they have shown that the original punishment was not sufficient. Von Hirsch and Ashworth’s desert-based account of first-time offender discounts, however, suggests that first-time offender status should be understood as a mitigating factor (rather than treating recidivism as an aggravating factor). The practical effect of this argument, then, is to set a cap on the effect prior record might have on sentence. This is quite a radical (but, we think, appropriate) challenge to much of contemporary sentencing practice.

The authors also incorporate another twist to just deserts in their new book that they have written about before: mitigation for young offenders, the disabled, and the infirm on the basis of what they call the “equal impact” principle.

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22. Indeed, they borrow a great deal from Frank Zimring’s quite different treatment of youth discounts in their arguments here. But Zimring’s arguments, unlike the one presented by von Hirsch and Ashworth, are consequentialist. See Franklin E. Zimring, *The Changing Legal World of Adolescence* (1982).

23. The difference between the concept of mitigation and aggravation is not always clear. The most important difference in practice is that with mitigation, there is always an upper limit on the effect of prior record—namely the deserved, proportionate sentence. With aggravation, however, there is a lower bound (set by the proportionate sentence), but no clear upper bound on the effect that prior record could have on sentence. For this reason, a system such as Minnesota’s, where prior record ceases to aggravate punishment after five prior convictions, appears to treat prior record as a “loss of mitigation” rather than as an aggravating factor.

This is simply a straightforward application of their model to the evaluation of criminal sentences. Of course, it would violate the principle of individual desert to adjust sentence severity to the offender's particular sensitivities (keeping the squeamish out of prison and leaving the hard-nosed in for extra time).<sup>24</sup> But where one offender will objectively suffer more from a particular punishment than would another—as, say, a disabled offender will suffer quantifiably more from life in prison than will a physically able offender—it would be unfair to impose the formally identical sentence on both. Substantive equality in sentencing sometimes requires formal inequality.

Another ground of mitigation that the authors at least consider in their new book is social deprivation. They suggest that those who are severely deprived deserve to be judged on a different standard from the rest of us who have lived our lives amid relative plenty.<sup>25</sup> In recognition of the substantially different situation faced by the seriously socially disadvantaged, von Hirsch and Ashworth argue that it would be appropriate to judge them by a different scale than others.<sup>26</sup> In the end, however, they reject this ground of mitigation, for not altogether compelling reasons. In societies such as the United States and the United Kingdom, where the majority of offenders live in poverty and deprivation, they argue that granting such a discount might have negative system-wide effects. Because the majority of offenders who commit certain sorts of offenses would receive such a discount, it would have the effect of simply reducing the tariff for those offenses, thereby misrepresenting to the public the seriousness of those offenses. This, von Hirsch and Ashworth argue, is too high a price to pay for doing

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24. However, this appears to be the approach favored by Antony Duff. See Antony Duff, *Punishment, Communication and Community* (2001). His reasons for doing so are different, however. He is concerned actually to bring about penance in the offender. If that requires more severe measures in some and less severe measures in others, then that is acceptable. This is one of the most important practical differences between his desert-based account and the one put forward by von Hirsch and Ashworth.

25. This, they argue, is for three reasons: (1) there are fewer lawful means available to them to accomplish their objectives; (2) the disincentives of punishment are less powerful to someone who lives in harsh physical surroundings and with little social standing to begin with; and (3) the mores of their community might be less supportive of law-abiding behavior than are those of the more affluent.

26. In so doing, they reject Antony Duff's intriguing suggestion that the state's complicity in the offender's social deprivation undermines its standing to punish him. See Duff, *supra* note 24, at 183.

justice to individuals in this sort of case. While this part of *Proportionate Sentencing* is intriguing, it is unfortunate that the authors do not pursue the issue beyond their assumption about its negative practical effect. The sheer scale of the problem of social deprivation, we contend, should lead us to give greater attention to larger issues of background justice, rather than simply to ignore the problem altogether.

Perhaps the most curious sort of mitigating factors that von Hirsch and Ashworth consider are the ones that they call “quasi-retributive” (174–78). They argue that in cases where an offender has made clear, unequivocal efforts to undo the effects of his wrongdoing (say, by making voluntary reparations to his victims), this should count as a mitigating factor. The reason for this, they argue, is that one of the purposes of punishment is to provide the offender with an opportunity to recognize the wrongness of what he has done and to express contrition for it. When the offender has already done so, then there is less reason to punish, and so a lesser punishment should be administered. This is a curious argument and it is also one that the authors spend virtually no time defending. Their discussion of this point is all of three sentences long (177). Without further discussion, this seems to be quite a weak argument and quite difficult to square with their broader just deserts account. The second “quasi-retributive” ground of mitigation they consider is the passage of time since the offense. They are on firmer ground with this argument. When a very long time has passed since the commission of an offense, there is good reason to argue that the person being punished is, in an important sense, a *different person* from the one who committed the offense. To the extent that the individual being punished is different from the one who committed the offense, mitigation is in order.<sup>27</sup>

Finally, von Hirsch and Ashworth consider two mitigating factors and one aggravating factor that they recognize are clearly at odds with the principles of “just deserts.” First, they give explicit recognition to the humanitarian principle that the very old and infirm should not be subjected to the punishment they deserve if this means that their basic human dignity

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27. This relationship of personal identity over time to responsibility for wrongdoing has a long philosophical pedigree. See, e.g., 2 John Locke, *An Essay Concerning Human Understanding* ch. 27 (J. Yolton ed., 1961); David Hume, *A Treatise of Human Nature* 251–63 (L.A. Selby-Bigge ed., 1978); Derek Parfit, *Reasons and Persons* pt. 3 (1984). Unfortunately, von Hirsch and Ashworth do not cite any of this voluminous literature in defense of their position.

would be undermined. Although this is clearly a compromise from their strict just deserts principles, it would be difficult to reject it.<sup>28</sup> Second, they reject arguments put forward by Anthony Bottoms and Roger Brownsword supporting the use of disproportionately severe punishments on those who are deemed to be “dangerous offenders” (50).<sup>29</sup> Their argument on this point is more practical than principled. Although it might be acceptable to limit an individual’s freedom for the sake of some pressing social concern, they argue, we are not at a stage now where we can predict with any accuracy who is, in fact, a dangerous offender and who is not. Until we can predict dangerousness with more accuracy, they argue, we cannot justify the massive intrusion on individual liberty that this entails.

Finally, in their acceptance of some mitigating and aggravating factors that run counter to strict proportionality, von Hirsch and Ashworth allow for deviations up or down from the proportionate sentence of up to fifteen percent (although they are not entirely consistent on the amount of the permissible deviation).<sup>30</sup> They argue that proportionality must remain the dominant consideration in sentencing, but other considerations (such as deterrence, rehabilitation, and the like) might provide good reasons for deviating from the proportionate sentence to some degree. This is different from humanitarian limits, which may require a downward deviation of considerably more than fifteen percent, and from “dangerous offender” designations, which would often require an upward deviation of far more than fifteen percent. These smaller deviations do not require strong principled arguments, von Hirsch and Ashworth argue, because they do not undermine the central position of proportionality in their analysis.

Taken together, these many adjustments to the just deserts account of sentencing amount to a seismic shift. Von Hirsch and Ashworth have not

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28. Moreover, as von Hirsch and Ashworth suggest (176), this is an unavoidable compromise. When the offender is so infirm that he cannot withstand his deserved punishment without “undue loss of self-esteem,” punishment loses its central purpose. It becomes merely the infliction of pain without hope of bringing the offender to a position to see the wrongness of his conduct.

29. See Anthony Bottoms & Roger Brownsword, *The Dangerousness Debate after the Floud Report*, 22 *Brit. J. Criminology* 229 (1982); Anthony Bottoms & Roger Brownsword, *Dangerousness and Rights*, in *Dangerousness: Problems of Assessment and Prediction* (J.W. Hinton ed., 1983).

30. While at one point they say a ten-to-fifteen percent deviation should be allowed (7), later they say that only a deviation of five-to-ten percent should be permitted (161).



given up any important arguments of principle from their earlier works, but they have set these principled arguments in a context that shows them to be of only limited practical significance. Although individual desert is still the driving concern in sentencing, it is clear that this is a much subtler and more complex notion than many would have us believe. The strict correlation between crime type and punishment that was mandated by the U.S. Federal Sentencing Guidelines, for example, represent a *departure* from just deserts principles rather than an endorsement of them.<sup>31</sup> Further, von Hirsch and Ashworth now make clear that even though distributive justice might be the “first virtue”<sup>32</sup> of sentencing judges, it is not the only one. In some circumstances, deviations from proportionality may be justified by other concerns.

### B. A “More Precise” Limiting Retributivism

The theoretical foundations of limiting retributivism were never altogether sturdy. Norval Morris was quick to recognize that his original formulation of the doctrine was insufficient. More recent versions of the theory have done away with the very loose community mores standard of proportionality and used something closer to von Hirsch’s notion of desert to set the outer limits of proportionate punishment.<sup>33</sup> Another aspect of Morris’s original formulation—that the bands of not disproportionate sentences could be extremely wide, leaving great leeway for sentencing judges to pursue instrumental ends—has also come under fire. More recent versions of the account have come to accept a much more important

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31. Andrew von Hirsch pointed this out as far back as in 1993. In *Censure and Sanctions*, von Hirsch argued that Tonry’s application of penal parsimony to particularly egregious cases under the U.S. Sentencing Commission’s guidelines is the wrong way to deal with the problem. Andrew von Hirsch, *Censure and Sanctions* (1993). Rather, he suggested, we should recognize that “[t]he tariff fashioned by the U.S. Sentencing Commission in no wise satisfies proportionality requirements.” *Id.* at 110.

32. John Rawls, whom von Hirsch and Ashworth clearly set as their model on a number of theoretical questions, famous called justice the “first virtue” of public institutions. John Rawls, *A Theory of Justice* 3 (1971). Nevertheless, even Rawls recognised that “even though justice has a certain priority, being the most important virtue of institutions, it is still true that, other things equal, one conception of justice is preferable to another when its broader consequences are more desirable.” *Id.* at 6.

33. Tonry, *supra* note 20; Frase, *supra* note 15.

role for ordinal proportionality<sup>34</sup>—the *relative* levels of punishment of one offender as compared to others—and considerably less room for judicial discretion within those limits. Von Hirsch and Ashworth point out that “[t]he upshot [of the recent changes to limiting retributivism proposed by Michael Tonry and Richard Frase] would be a scheme of ‘limiting retributivism’ that has considerably greater similarities to a desert-based approach than Morris’s early formulations” (182).

In a 2004 article devoted largely to extolling the legacy of Norval Morris, Richard Frase endorses Morris’s basic notion of limiting retributivism but he also urges his fellow limiting retributivists to set out a “more precise formulation of the LR model.” In that article, Frase recognizes that Morris’s original formulation was too broad and loose. Frase opines that limiting retributivism “must, itself, be kept within some limits or it ceases to have any real meaning or utility.”<sup>35</sup> He points to the guidelines system in Minnesota as a model of how limiting retributivism can be made more precise and therefore more meaningful and more useful as a theory. Not surprisingly, the American Law Institute, in its new draft *Model Penal Code: Sentencing* guidelines based on limiting retributivist principles, also looks to the Minnesota system as a model.

What sort of precision does the Minnesota model provide that earlier formulations of limiting retributivism lacked? Most importantly, it provides a clear and central role for proportionality in the determination of sentence severity and it provides only fairly narrow deviations (of about fifteen percent around a central point)<sup>36</sup> from proportionality in pursuit of instrumental ends. A sentencing grid, based on crime seriousness and the offender’s prior record, sets out a presumptive sentence and a range within which the sentence will still be considered proportionate. The calculation of sentence severity does not begin with a consideration of utilitarian goals limited only by loose notions of what society will deem disproportionate; rather, it begins by a determination of what punishment is proportionate

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34. Even by 1982, Morris had come to the position that parity in sentencing should at least play the role of guiding principle—that is, our default position (“unless there are other substantial utilitarian reasons to the contrary”) should be to impose equal sentences on equally culpable offenders. Morris, *supra* note 14, at 198.

35. Frase, *supra* note 15, at 104.

36. Minn. Stat. § 244.09 (5)(2) (2007) states as follows: “The guidelines shall provide for an increase of twenty percent and a decrease of fifteen percent in the presumptive, fixed sentence.”

to the offense and then a consideration of several factors that might justify a deviation from that proportionate sentence.

The ALI's new draft sentencing provisions simply state, without much discussion, that its model of sentencing should be a hybrid. The draft encapsulates this approach, along with the importance of "rule of law" attributes, in the statement:

One goal of a revised Model Code should be to encourage the introduction of generally applicable rules and principles to the sanctioning process to the extent such governance is feasible, reserving room for individualized discretion in cases where good reasons can be cited for a more qualitative mode of decision making.<sup>37</sup>

It is not surprising, then, that the draft starts with Norval Morris and limiting retributivism. Like Morris, the ALI acknowledges the importance of proportionality in sentencing, but also like Morris, it expresses skepticism about the possibility of precise determinations of proportionality in particular cases. Rather than engaging von Hirsch and Ashworth's detailed arguments about ordinal proportionality, however, it simply goes through a rather unconvincing "forcible date rape" case example to demonstrate the difficulty of determining the precisely proportionate sentence. Taking this crucial point of disagreement with von Hirsch and Ashworth almost for granted, it posits, without criticism, the observation that "[w]ithin the permissible range of severity, LR provides that the utilitarian purposes of punishment may be weighed."<sup>38</sup>

Despite its endorsement of limiting retributivism in general, the ALI's notion of penal parsimony is one that would be almost unrecognizable to Norval Morris. Section 1.02(2) of the new provisions makes proportionality the first general principle of sentencing, followed by the modern version of penal parsimony which requires judges "to render sentences no more severe than necessary to achieve the applicable purposes from subsections (a)(i) [to impose roughly proportionate sentences] and (ii) [to serve goals of deterrence, rehabilitation, incapacitation and restoration]."<sup>39</sup> That is, although the drafters of the new sentencing provisions still include a provision that appears to promote penal parsimony (which is of

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37. Model Penal Code: Sentencing 65-66 (Discussion Draft 2003).

38. *Id.* at 39.

39. *Id.* at 129.

particular concern to limiting retributivists), they still give considerable weight to proportionality. At the end of the day, the ALI concludes that the relative ordering of desert and instrumentalism could depend on the degree of seriousness of an offense.<sup>40</sup> In other words, a jurisdiction could allocate the purposes of sentencing in different ways depending on how grave an offense category is judged.

Important as these subtleties of parity and parsimony surely are, however, the real significance of the ALI's project lies elsewhere. Its work can only be understood in the context of two significant developments in the American criminal justice system. The first is the increase in incarceration rates over the past thirty years producing huge racialized prison populations. The second is the proliferation of sentencing commissions, many of which were started with an ostensible, albeit unsophisticated, allegiance to supposed just deserts principles. While the failures of the federal scheme, and the recent constitutional decisions from the U.S. Supreme Court, have dominated much of the debate, the ALI points to other jurisdictions, principally Minnesota, as examples of the potential of a well-constructed commission model that leaves appropriate room for considerations beyond stipulated guidelines. Perhaps because of the highly politicized nature of the American posture towards crime and punishment, the ALI ultimately chooses a sentencing commission model for its new code. The real significance of the ALI's project is its focus on commissions, the gathering of data, and the regular review of overall sentencing levels.

In crafting its new model, the ALI makes a number of important choices, many of which reflect pragmatic considerations spawned by the American experience and developed by leading limiting retributivism advocates, particularly Michael Tonry. Essentially, amongst other related elements, it decides that a sentencing system must:

- pursue the “elusive commodity” of a high degree of uniformity in sentences;
- apply its principles on a system-wide basis;
- include some power to provide, or at least address, resources;
- deal with “racial and ethnic over-representations”; and
- provide better information about itself and its effectiveness.<sup>41</sup>

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40. *Id.* at 40–41.

41. For a discussion of these details, see *id.* at 85–109.

These are laudable goals, especially if they can be pursued in a way that encompasses the need to explain in accessible terms what one is doing. Whether this can be achieved in light of what appear to be potentially conflicting goals, however, remains to be seen.

### C. Remaining Differences

Although limiting retributivism and just deserts concentrate on different aspects of the sentencing enterprise, this does not exhaust the differences between them. Von Hirsch and Ashworth's focus on justice in the distribution of punishments and the limiting retributivists' focus on parsimonious, effective punishment still lead them to different conclusions on a number of key issues. When faced with a direct conflict between these two basic principles, they tend to fall on opposite sides of the debate.

One area of unavoidable disagreement is on the question of intermediate sanctions (those sanctions that, as Morris and Tonry put it, lie "between prison and probation"<sup>42</sup>). The limiting retributivists such as Morris, Tonry, Frase, and Reitz seek to encourage the use of intermediate sanctions over prison in as many cases as possible. The ALI makes this an explicit goal of the sentencing system as well as a potentially appropriate aspect of the sentencing decision.<sup>43</sup> Von Hirsch and Ashworth are much more circumspect but not because just deserts requires that more offenders go to prison. Indeed, von Hirsch and Ashworth make clear on many occasions that they, too, are very concerned to keep prison populations to a minimum.<sup>44</sup> Their concern is that if sentencing judges are free to choose among too wide a variety of intermediate sanctions, then the task of maintaining consistency in proportionate sentencing will be unmanageable. It is hard enough to determine precisely how many years of prison is fitting for a particular crime committed by a particular offender under particular circumstances. Adding a whole other layer of complexity—determining

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42. Norval Morris & Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (1990).

43. See Model Penal Code: Sentencing § 1.02(2)(b)(iv), (a)(ii) (Discussion Draft 2006).

44. They provide several argument for the sparing use of punishment generally and of imprisonment in particular. They endorse the principle of parsimony, so long as it is applied consistently across all offenders; they also argue that the censuring message of punishment will be "drowned out" if punishments become too severe; and finally, they point out that long-term imprisonment has "devastating effects on those incarcerated" (142).

precisely how much house arrest or how large a fine is equivalent to a certain custodial sentence—turns proportionate sentencing into a mere aspiration, an unattainable ideal.

On this question, we are highly skeptical of von Hirsch and Ashworth's objections. Although they are quite right to insist that sentencing judges should try as best they can to ensure that the sentences they hand down are proportionate to the offenders' deserts, this fairness concern should not be used as a tool to stifle judicial creativity. Proportionality is most important where offenders will be facing long terms of imprisonment. As the need for severe punishment decreases, there is a reciprocal increase in the importance of providing meaningful rehabilitation opportunities and avoiding the rigors and dislocation of punishment. It is for this reason that sentencing grids usually only cover the more serious offenses, leaving lower level offenses to be dealt with in a manner that is more concerned with outcomes and less with distributive justice.<sup>45</sup> Certainly, it is a difficult task to make the translation from one kind of sanction to another, but it is not insurmountable and only requires some decisive guidance on equivalence.

A second area of difference is the use of "dangerous offender" designations to identify individuals who may be incarcerated for terms that far exceed their deserved penalty for a specific offense. Whereas both sides are skeptical of the practice and neither side absolutely forbids the practice, it is clear that von Hirsch and Ashworth are more inclined to do away with it than are most limiting retributivists. In some jurisdictions such as Sweden where the sentencing model most closely resembles von Hirsch and Ashworth's just deserts account, they have done away with "dangerous offender" designations without any disastrous consequences. This experience suggests that the North American fascination with dangerous offenders might be more of a cultural phenomenon (part of our culture of "risk management")<sup>46</sup> than a clear-headed criminological policy choice. The current ALI model encompasses the possibility of severe incapacitative sentences through the mechanism of an extraordinary departure in compelling

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45. In Minnesota, for example, the grid only covers felonies (using misdemeanors only for the purposes of calculating prior record). See Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary* (August 1, 2005), available at [http://www.msgc.state.mn.us/Text%20Only/sentencing\\_guidelines.htm](http://www.msgc.state.mn.us/Text%20Only/sentencing_guidelines.htm).

46. See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001).

circumstances which can be more than twice the maximum presumptive sentence. Perhaps the ALI compromise of proportionality to this extent is simply a concession to the political reality of some American jurisdictions in an effort to make the model more palatable. Still, both sides make clear that there must be a preliminary empirical question that depends on the reliability of our risk assessments. Because the practical stakes are so high, it is not something that should be decided simply on the basis of our favored model of sentencing.<sup>47</sup>

By far the greatest difference between the two camps, however, is not a matter of outcomes, but rather of reasoning. It is on this issue that von Hirsch and Ashworth demonstrate the real merits of their account. Time after time, on issue after issue, von Hirsch and Ashworth demonstrate that there are perfectly good desert-based reasons justifying practices that limiting retributivists explain simply by reference to public policy considerations. The individual offender can reasonably ask “why should I be subject to a more severe punishment than someone who committed the same offense as me but who happens to have a clear record?” In response to that challenge, von Hirsch and Ashworth have a compelling answer: “because *your* individual desert is greater.” Limiting retributivists can only reply: “because we believe that it will take less to deter him than it will to deter you.” Although limiting retributivism probably explains our policy-based *motivations* for mitigating or aggravating sentence, von Hirsch and Ashworth consistently present more compelling *reasons* that we can provide to the offender and to the society as a whole for imposing the particular sentence.

### III. A DIFFERENCE IN EMPHASIS: THE INSTITUTIONAL DIMENSIONS

In this section, we begin with an examination of the nature of the judicial role in the sentencing context and some of the challenges faced by jurisdictions that wish to impose greater discipline on judicial sentencing practice

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47. Paul Robinson provides an interesting alternative for those who are otherwise convinced by von Hirsch and Ashworth. He argues that dangerous offenders can serve their sentence and then undergo indefinite civil confinement, thereby avoiding the censuring aspect of their further incarceration. See Paul Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice 114 Harv. L. Rev. 1429 (2001).

and reasoning. We then turn to the aspect of sentencing emphasized by the ALI's new draft sentencing provisions: the creation of permanent sentencing commissions and the advancement of overarching policy goals through the criminal justice system. In particular, we discuss the ALI's thoughtful and important discussion of two acute problems in the American criminal justice system today: overrepresentation of minorities in prison populations and the rapid growth of prison populations more generally. Finally, we turn to restorative justice—a movement that both sides recognize to be an important force in criminal justice policy debates today.

### A. Sentencing and the Judicial Role

No model for sentencing can be developed without a serious consideration of the role of the judge. There are two aspects of the judicial role that need to be examined. The first is the question of why judges, and not some other officials or functionaries, must be the ones to impose sentence. The second, which flows from the first, is how best to preserve the authority and dignity of the judicial office by means of sentencing principles. Unduly restrictive rules of sentencing, such as the American federal sentencing guidelines before *Booker*,<sup>48</sup> tend to undermine the judge's ability to render a just sentence. But too much unfettered discretion, as was the case in the days of indeterminate sentencing, undermines the claim of sentencing to being a principled exercise. Navigating between these extremes is a difficult and pressing problem in every system of criminal justice.

It is generally assumed that even if a criminal sentence is mandated by statute, it must be imposed by a judge, not recited by a clerk from a script. But why should that be? Part of the story, of course, is that the seriousness and solemnity of the occasion requires the majesty of the judge's robes and the grandeur of the courtroom for its performance.<sup>49</sup> For obvious reasons, many sentencing judges have been quick to embrace this notion of their own importance. For many years Canadian judges conceived of their sentencing role in rather grand terms as “an art—a very difficult art—essentially practical,

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48. *United States v. Booker*, 543 U.S. 220 (2005).

49. John Gardner puts great stock in the dignity of the state apparatus of punishment to instill respect for the law without recourse to harsh treatment. See John Gardner, *Crime: In Proportion and in Perspective*, in *Fundamentals of Sentencing Theory* 31, 49 (Andrew Ashworth & Martin Wasik eds., 1998).



and directly related to the needs of society.”<sup>50</sup> This is a compelling picture, but a curious one. One can see the wise judge with his palette squinting at the offender as he applies another dab of punishment to finish the piece. The image may be quaint but it is also nonsense. The fact of a judicial appointment, or in some American states the election to a judicial post, cannot be assumed to endow the new judge with sentencing wisdom.

The reason why we insist that judges be the ones to pass sentence is, in fact, almost the complete reverse of the image of the “judge as artist.” We do not turn to judges because of their robes or their access to grand courtrooms or because they have some inexplicable artistic talent for determining precisely the right sentence in each case. Rather, we do so because it is the judge—and only the judge—who has the legal authority and obligation to provide authoritative reasons justifying the particular sentence imposed on the offender. At the root of the judge’s authority to impose sentence is her obligation to articulate in public the state’s reasons justifying the imposition of that sentence.<sup>51</sup>

Von Hirsch and Ashworth’s account of sentencing takes as its starting point this basic connection between the legitimacy of a particular sentence and the reasons that the sentencing judge can provide to explain why that sentence, rather than any other, is appropriate. This general principle stands in stark contrast to the traditional practice in most English-speaking countries. Historically, since the rope ceased to be the common response to all felonies, judges were given wide discretion to determine the appropriate sentence. Although judges could look for guidance to other similar cases, if they were available, the ultimate decision was left to the judge’s individual judgment subject perhaps to a legislated maximum and appellate review. In 1972, Marvin Frankel referred to this sort of sentencing practice as a “wasteland in the law” and characterized the general situation as one of “lawlessness.”<sup>52</sup> He concluded, quite aptly:

Despite all the philosophizing on this most fundamental of subjects in scholarly works and random judicial opinions, we have virtually no meaningful or specific legislative declarations of the principles justifying criminal sanctions.<sup>53</sup>

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50. *R. v. Willaert* (1953), 105 C.C.C. 172 (Ont.C.A.) at 176.

51. For a particularly rich account of the centrality of reason-giving to the criminal trial, see R.A. Duff, *Trials and Punishments* (1986).

52. See Marvin E. Frankel, *Lawlessness in Sentencing*, 41 *U. Cin. L. Rev.* 1 (1972).

53. *Id.* at 41.

But, as we have seen, sentencing theory and practice have come a long way over the past thirty years. There are now very few jurisdictions where judges have unbridled discretion in their choice of sentence. The problem we now face is much narrower and more focused. The concern facing both von Hirsch and Ashworth's just deserts and the ALI's limiting retributivism is how best to navigate between too much guidance, which turns sentencing into a mechanical exercise, and too little guidance, which risks sending us back to the lawlessness of the 1970s.

The ALI's new *Model Penal Code: Sentencing* provisions still leave some important questions to judicial discretion. Perhaps most notably, § 1.02 (2)(b)(i) states that a sentencing system should look "to preserve substantial judicial discretion to individualize sentences within a framework of recommended penalties."<sup>54</sup> Although it defines a range of severity within which a sentence must fall, it permits judges to pursue specific objectives within that range (so long as they do so with restraint). Subsection (b) currently adds nine procedural and normative factors to the sentencing matrix including individualization, the elimination of discrimination, the prevention of unjustified racial overrepresentation in sentenced groups, and the encouragement of intermediate punishments. In total, this methodology permits judges to pursue proportionality while still maintaining judicial concern for the human and systemic impacts of the sentencing system and an ability to respond where warranted by the circumstances of the case. This is an example of what Andrew Ashworth calls "cafeteria-style" sentencing, in which judges are free to choose among principles largely according to their own whim. This is the case in many Commonwealth jurisdictions, including Canada where "proportionality" is recognized as a "fundamental principle" of sentencing. Within a matrix of potentially conflicting objectives, it should be no surprise that the cafeteria often serves up some inappropriate and unsettling penal meals.

## **B. Sentencing, Institutions, and Public Policy**

The institutions of sentencing and penal policy in general are subjects that consume much of the ALI's attention. In particular, limiting retributivism tells us something very important about sentencing and public policy,

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54. Model Penal Code: Sentencing § 1.02(2)(b)(i) (Discussion Draft 2006).

something that is all too easy to forget: there is an enormous cost to sentencing. Even if there are legitimate reasons for policy makers to concentrate on reducing crime, when it comes to sentencing they must be wary of penal populism and its manipulation of incapacitative and deterrent claims. Limiting retributivism is based on the Benthamite premise that criminal punishment is “in itself evil” and should be avoided unless absolutely necessary. Prisons are expensive to build; electronic monitoring is expensive; imprisoning offenders may actually increase recidivism rates;<sup>55</sup> and—last but certainly not least—virtually all criminal sentences impose huge social costs not only on offenders but often on their families and their communities, as well.

Consistent with this view, the ALI model goes beyond the role of the sentencing judge. It offers its view on the various elements of a sentencing system, always demanding integration with, and conformity to, the basic sentencing principles. At the front end, it encourages the establishment of permanent sentencing commissions to develop appropriate sentencing guidelines. The commission should be an independent governmental agency that will include members of the judiciary and the legislature, along with lawyers, academics, and lay members. It will propose sets of guidelines including the extent and bases for departures from the “recommended sentences.” This is a very detailed part of the 2006 ALI *Discussion Draft* and we do not intend to examine it here.<sup>56</sup> There are two particularly significant features of this recommendation, however, that merit comment. First, the creation of such a commission at arm’s length from the legislature is a practical way of insulating the setting of sentencing policy somewhat from populist rhetoric. This responds to a pressing concern in sentencing to avoid the use of penal policy as a tool for the promotion of crassly political objectives. Second, the creation of such an expert body to monitor sentencing practice and to revise overall practice as necessary would fill a long-standing need. Around the world, one hears constant complaints about the dearth

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55. P. Gendreau, C. Goggin, & F. Cullen, *The Effects of Prison Sentences on Recidivism* (1999).

56. Clearly, it is influenced by the constitutional debates following *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). Given their source in the sixth Amendment to the United States Constitution and the Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), they are distinctively American artifacts and have no direct bearing on either England or Canada.

of sentencing data or of data that are not carefully collected or properly aggregated to permit useful analysis on relevant questions. A properly staffed permanent commission is the right body to play this necessary role.

The ALI's model sentencing provisions also make reference to two important objectives concerning "the administration of the sentencing system." The first objective of note is "to eliminate inequities in sentencing across populations groups."<sup>57</sup> The 2003 ALI *Discussion Draft* went to great lengths to document the over-representation of African Americans and Hispanics in U.S. jails. However, it did not take a simplistic view that overrepresentation equals discrimination. In its research review, it distinguished between racial disproportionality that can be explained by racial differences in the commission of crimes as compared to "unexplained" racial disproportionality. For the latter group, perhaps twenty-five percent, it concluded that "racial biases influence punishment most dramatically where there is widest discretion over arrest, charging, and sentencing decisions."<sup>58</sup> But more revealing is the perceptive way in which the ALI addressed racial disproportionality in general, including differences in crime commission rates:

Racial disproportionalities in punishment are a national tragedy, but so are racial disproportionalities in crime commission and victimization, especially at the high end of the violence spectrum. It has for some time been politically correct to avert one's eyes from the facts of black-white crime differentials, but avoidance tactics do a good service to no one. If it is true that the bulk of punitive disparity originates in differential crime rates, then anyone who cares about racial justice in America should be focusing major effort on understanding and combating the causes of higher levels of crime in our poor, urban, minority communities.<sup>59</sup>

No American criminal justice system can stand aloof from the stark realities of long-standing racial differences in sentencing outcomes, and growing ethnic differences, whatever their sources. Such disparities produce corrosive effects on perceptions of fairness and system legitimacy within minority communities which reach far outward into law and culture. Not all answers lie in philosophical discourse. This bold statement shows the need for a social critique that informs the development of sentencing policy.

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57. Model Penal Code: Sentencing § 1.02(2)(b)(iii) (Discussion Draft 2006).

58. Model Penal Code: Sentencing 98–99 (Discussion Draft 2003).

59. *Id.* at 100.

The second objective of note also relates to incarceration rates: “to encourage the use of intermediate sanctions.”<sup>60</sup> One cannot be involved in the sentencing debate in the United States without being affected by the enormous rates of incarceration over the past few decades. This situation cannot be resolved simply by rhetoric about proportionality but will require an expanded use of non-custodial penalties. Von Hirsch and Ashworth would agree, but their work does little to explain how the move from custodial to intermediate and non-custodial sanctions will actually be achieved while still not undermining proportionality. Perhaps for each kind of sanction we would need a ladder that reflects both ordinal and cardinal proportionality. The translation from one scale to another requires determining how the ladders should be laid side-by-side, recognizing that not all sanctions will have analogues. For example, no fine will be commensurate with life imprisonment. Accordingly, the tops and bottoms of the various ladders will start at different places. But how, precisely can we align these various ladders for probation, fines, imprisonment, etc.? Von Hirsch and Ashworth continue to assure us that this can be done but offer little to achieve it. The ALI recognizes the need to address this issue which it describes as the need for “layered purposes” but it expresses concern that, at the moment, “[n]o American guideline system currently exploits the full potential of purpose-based sentencing, largely because promising innovations exist piecemeal across a number of systems and are nowhere combined into a single comprehensive program.”<sup>61</sup>

It is interesting that neither addresses in a serious way the issue of early release from imprisonment. The ALI notes that many jurisdictions have abolished parole. As well, the Minnesota remission system means that a large chunk, perhaps twenty-five percent, of a sentence is beyond the power of the judge. But the ALI does not offer a pronouncement on early release other than to ensure that, like any other sentencing institution, it would be governed by common principles and objectives. From a just deserts perspective, a form of early release can be adopted so long as one accepts two things. First, the proportionate sentence is amenable to a certain amount of deviation on other grounds. Second, the release decision cannot encompass desert but must look to other factors like risk and rehabilitation. Von Hirsch and Ashworth do not address this issue.

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60. Model Penal Code: Sentencing § 1.02(2)(b)(iv) (Discussion Draft 2006).

61. Model Penal Code: Sentencing 71 (Discussion Draft 2003).

### C. Restorative Justice

Von Hirsch and Ashworth devote an entire chapter to the republication of an article coauthored with Clifford Shearing in which they explore the possibility of building and adapting a “making amends” restorative model to a just deserts framework.<sup>62</sup> They make significant observations about the large “aspirations” of restorative justice and the inherent lack of definitional specificity before examining the positive reconciliatory features of a “making amends” model. This model, as one example of restorative justice, encompasses a form of moral discourse between victim and cooperative offender that is both “negotiated and discursive in character.” The process, if successful, would lead both to an acknowledgment of responsibility and a negotiated disposition. Ultimately, von Hirsch and Ashworth remain “sceptical” about the ability to incorporate “making amends” into just deserts even with the needed innovations that they identify (129–30). What is significant, however, is their recognition that so much attention is being paid to restorative justice that one cannot simply dismiss it. Serious scholars need to examine its successes to determine what role it can play in a sentencing scheme.

Conversely, the ALI model spends little time assessing restorative justice but reserves a large potential role for it. In its second guiding principle where it makes room for utilitarian objectives, it expressly endorses the “*restoration of crime victims and communities, provided that these goals are pursued within the boundaries of sentence severity. . . .*”<sup>63</sup>

When considered within the context of the ALI’s systemic concerns about research and evaluating the effectiveness of sanctions,<sup>64</sup> it is clear that they are leaving room for innovative responses but demanding some showing of appropriateness to the context and prospect of success. The ALI recognizes that some restorative practices have proven successful for some offenders. This does not compel a shift in priority away from proportionality but simply requires leaving room within the sentencing matrix for good restorative claims to be made.

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62. Andrew von Hirsch, Andrew Ashworth, & Clifford Shearing, Specifying Aims and Limits for Restorative Justice: A “Making Amends” Model?, in *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* 21 (Andrew von Hirsch et al. eds., 2003).

63. Model Penal Code: Sentencing § 1.02(2)(a)(ii) (Discussion Draft 2006) (emphasis added).

64. *Id.* § 1.02(2)(b)(vii).

The ALI recognizes that there have been important rehabilitative developments that need to be incorporated into a sentencing scheme when appropriate. Always with an eye to available resources, this could mean therapy instead of penal confinement for specific sets of people like addicts or the mentally disordered. It could mean a restorative process like family group counseling, sentencing circles, or a “making amends” model. Still, the ALI requires that the accommodation be “within the bounds of sentence severity.” This is where much work will need to be done to incorporate alternative dispositions. Again, justice may require it and the ALI model addresses this in two ways. First, it preserves judicial discretion “to individualize sentences within a framework of law.”<sup>65</sup> Second, it looks to a sentencing commission to recommend the “penalty, range of penalties, alternative penalties, or combination of penalties” available for “an ordinary case within a defined class,”<sup>66</sup> as well as the possibility of “extraordinary-departure sentences.”<sup>67</sup> This is another example of how the ambitious work of the ALI leaves a colossal set of tasks for any sentencing commission that follows this path.

## CONCLUSION

The publication in 2005 of *Proportionate Sentencing* will prove to be a milestone in sentencing theory discourse. Von Hirsch and Ashworth make a compelling argument both for the need to follow a principled approach that can be explained accessibly to the offender, the victim, and the community, and also that the principle that best satisfies this goal is proportionality, the central tenet of just deserts. In this book they refine their previous analysis and rebut some of their critics’ arguments. They also show that they can accommodate departures from proportionality, for example in cases of old age, infirmity, and perhaps some other cases calling for compassion. This is both a strength and a weakness of their updated work. They accept that the sentencing calculus needs to be open to some factors outside the scope of gravity of the offense but, at the same time, they place an arbitrary cap of fifteen percent on any divergence from proportionality.

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65. Id. § 1.02(2)(b)(i).

66. Id. § 6B.01(3).

67. Id. § 6B.01(5).

Still, one cannot read *Proportionate Sentencing* without being impressed by the rigor of its analysis and the creative intellect of its authors. It is the best account yet of a theoretically-based sentencing model that fulfills the fundamental justice goal of providing a judge with a clear and principled basis to explain the imposition of state punishment.

The ALI's 2006 model, the most extensive example of limiting retributivism to date, is equally significant but for different reasons. The model spans all sentencing institutions including the commission that articulates the recommended guidelines, the court that follows or diverges from those guidelines, the appellate court that reviews sentences, and the correctional machinery that implements the sentence. The ALI seeks to integrate all these institutions within a framework that works according to common principles and objectives. While the model is premised on the central role of proportionality, it goes much further than von Hirsch and Ashworth in authorizing departures even to pursue utilitarian goals. These conflicting objectives may prove problematic in practice but they open the sentencing matrix to evidence of new treatment modalities for mentally disabled or drug-addicted offenders and also new restorative innovations. Of course, there must be evidence that new developments present some likelihood of success but the ALI addresses this issue by including research, monitoring, and evaluation within the model's mandate. Anyone who examines the model will be impressed by its almost comprehensive approach to the practical needs of a sentencing system. We say "almost" because much is left for the proposed sentencing commission to develop.

We cannot leave this essay without saying something about parsimony, or restraint. This has always been a central tenet of Morris's approach and it continues to play a central role in the ALI model and has been codified in Canada.<sup>68</sup> Von Hirsch and Ashworth accept the importance of restraint, but they consider it to be an essential *systemic* attribute. This means that overall sentencing levels should be set low, but it provides little consolation in particular cases where it is clear that the proportionate sentence will do more harm than good. Conversely, limiting retributivists can rely on ancillary utilitarian objectives to satisfy parsimony. But there are qualifications here as well. The goals must be enforced on a system-wide basis and they must be supported by empirical evidence that they are reasonably achievable.

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68. See Criminal Code, S.C. 1995, c. 22 §§ 718(c), 718.2(d)–(e).



Whether the ALI model is up to this task depends on how the proposed sentencing commissions do their jobs of monitoring, assessing, and revising guidelines.

The combined effect of the addition of these two works into sentencing discourse relates critically to the general subject of penal policy. Given the need for a principled, coherent sentencing theory as argued by von Hirsch and Ashworth, and given the complexity of the interacting elements required to make a sentencing system work effectively and fairly as explained by the ALI, it is clear that a jurisdiction needs an overarching penal policy that anchors policy decisions. It must be a policy that is coherent and that is supported by experience, empirical evidence, and the core values of the community. It needs to be the yardstick by which new policy arguments are measured. It is not possible to satisfy the philosophical and practical needs of sentencing if one gives in to the ever-present rhetorical claims about using the courts to wage a war on crime or create safer streets with enhanced mandatory minimum sentences and recidivist statutes. These paths are contradicted by sound social science evidence and conflict with basic concerns about proportionality and restraint.

On a personal note, one of us embarked on this project as an unrepentant critic of just deserts. He is now a convert who accepts the fundamental role of proportionality as the engine which must drive sentencing decisions. The reason for this conversion is simple. Following Rawls, who was more interested in just outcomes than good outcomes,<sup>69</sup> von Hirsch and Ashworth provide a sound argument that only proportionality provides a just approach to sentencing. It is one that can, on a principled basis, be explained to all concerned and that will work to reduce unjustified disparity. However, as they now admit, there is room for considerations outside of offense gravity. But these need to be articulated by principle, otherwise we may descend back into the chaos of unconstrained discretion where the best a judge can say is that sentencing is an art. This means that mitigating and aggravating factors that do not reflect offense severity need to be based on legitimate, accepted, and articulated categories, and any ancillary utilitarian goals need to be based on evidence and supported by state resources. Only then will a sentencing model promote a penal policy that is both just and effective.

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69. Joel Feinberg points out this basic feature of Rawls' account. See Joel Feinberg, *Rawls and Intuitionism*, in *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* 108 (Norman Daniels ed., 1975).